

INTERIM DECISION

The Human Rights Code, 1981, S.O. 1981, c.53

In the matter of the Complaint made by Flora Dudnik dated July 14, 1987 (amended February 9, 1988) alleging discrimination in accommodation on the basis of family status against York Condominium Corporation No. 216 and its Board of Directors and Nick Kaloger, Property Manager
and

In the matter of the Complaint made by Constance Cryderman dated August 7, 1987 (amended February 16, 1988) alleging discrimination in accommodation on the basis of family status against York Condominium Corporation No. 229 and its Board of Directors
and

In the matter of the Complaint made by Berta Kogan dated October 28, 1987 (amended February 11, 1988) alleging discrimination in accommodation on the basis of family status against Metropolitan Toronto Condominium Corporation No. 551 and its Board of Directors and Officers B. Collins, B. Potashner, A. Persin, J. Tessis, M. Usakovsky, H. Fisher, N. Green, H. Reisler, L. Tohn and P. Weinberg
and

In the matter of the Complaint made by Lana Salmom dated January 28, 1988 (amended April 12, 1988) alleging discrimination in accommodation on the basis of family status against Metropolitan Toronto Condominium Corporation No. 624 and its Board of Directors and Peggy Meecham
and

In the matter of the Complaint made by George Ramdial dated January 27, 1988 (amended on April 18, 1988) alleging discrimination because of association and an infringement of the right to contract on the basis of family status and reprisal against Metropolitan Toronto Condominium Corporation No. 624 & Board of Directors and Rex Atkins and Peggy Meecham.

Before: Peter A. Cumming
Paula Knopf
Ian Springate

as a Board of Inquiry

Appearances:	David Moore	Counsel for Commission
	Charles Campbell	Counsel for Complainant Lana Salmon and George Ramdial
	David Kent	Counsel for Complainants Constance and Molly Cryderman
	Michael Spears	Counsel for Respondent York Condominium #216 and #229 and their Directors
	Howard Winkler	Counsel for Respondents Metropolitan Toronto Condominium Corp. #551 & #624 and their Directors

1. Introduction

This Board of Inquiry is unique in three aspects. First, it is the first occasion that a Board of Inquiry has been constituted under Ontario human rights legislation as a three person, rather than single person, tribunal.

Second, the several complaints raise as a main, substantive issue, one of first instance. Specifically, the Complaints allege as the main substantive issue a breach of sections 1 and 8 and/or section 10 of the Human Rights Code, 1981 S.O., 1981 c. 53, as amended, (the "Code"). The Complaints allege that the Respondent condominium corporations unlawfully discriminate because they deny a right to equal treatment with respect to facilities because of "family status". That is, children are prohibited from residing in such condominiums. The Complainant owners all claim that this is unlawful discrimination. As there appear to be a large number of 'adult only' condominium complexes in Ontario, the resolution of this issue would seem to have significant ramifications.

As well, the Complaint (Exhibit #4, as amended) of Constance Cryderman, a child, by her litigation guardian (her mother, Molly Cryderman, the owner of a condominium, and herself

a Complainant as owner) alleges unlawful discrimination because of age.

The "age" ground in the Cryderman Complaint in turn raises another unique issue of first instance.

"Age" is specifically defined in section 9(a) of the Code.

"age" means an age that is eighteen years or more, except in subsection 4(1) where "age" means an age that is eighteen years or more and less than sixty-five years;"

Thus, at first impression at least, "age" cannot be a prohibited ground giving rise to unlawful discrimination under the Code, should the discrimination be because the offended person is under eighteen years of age, as is Constance Cryderman.

However, this does not conclude this issue because the Crydermans submit that section 9(a) should be held to be without force and effect pursuant to section 52(1) of the Canadian Charter of Rights and Freedoms. To succeed, this assertion would require a finding by the Board of Inquiry that section 9(a) of the Code (at least where the factual situation relates to the denial of access to condominium facilities) is offensive to section 15 (the "equality rights" provision) of the Charter, and section 9(a) is not removed from the ambit of section 15 due to

the saving provision, section 1, of the Charter. If section 9(a) of the Code can meet the criteria of section 1 of the Charter the result is that under-eighteen age discrimination is lawful, being a reasonable limit upon the equality rights of individuals.

If successful in their assertion that section 9(a) of the Code is unconstitutional because of section 15(1) of the Charter, the Crydermans argue that section 9(a) of the Code is then of no force and effect and, given the facts as they allege them, they would then assert that there is a breach of sections 1 and 8 and/or 10 of the Code on the basis of unlawful discrimination because of age.

An analogous issue is seen in Re Blainey and Ontario Hockey Association et al., [1986] 54 O.R. (2d) at 513. The Ontario Court of Appeal there considered the situation of a 12 year old girl who had been prevented from playing on a boys' hockey team by the regulations of the governing athletic associations. Section 19(2) of the then Code expressly provided that such discrimination was not unlawful. The Court held, Finlayson J.A. dissenting, that then section 19(1) of the Code was contrary to section 15(1) of the Charter, and therefore was unconstitutional and of no force or effect.

It is only necessary for the Complainants Cryderman to pursue the "age" as a prohibited ground argument, if they are

unsuccessful on the "family status" as a prohibited ground argument. However, they want to pursue both avenues for liability in the one hearing, utilizing the same evidence. To do this, it means that the Board of Inquiry must presume that it has jurisdiction to make a finding under section 52(1) of the Charter that section 9(a) of the Code is of no force and effect. Respondents are not prepared to concede this jurisdiction, and this was the first of two preliminary issues to be dealt with by the Board of Inquiry.

(a) The Jurisdiction of a Board of Inquiry to Make a Finding under Section 52(1) of the Charter.

The first preliminary issue arises through a motion by the Respondents that this Board of Inquiry does not have jurisdiction to make a finding under section 52(1) of the Charter that section 9(a) of the Code is of no force and effect..

Counsel for the Crydermans argues that on this jurisdictional issue either section 24(1) or section 52(1) of the Charter could be utilized by a human rights tribunal to render section 9(a) of the Code without force and effect on the basis that it violates the equality rights guaranteed by section 15 of the Charter. To rely upon section 24(1) requires that a board of inquiry be considered to be included within the meaning of the words "a court of competent jurisdiction" employed by that

provision. It is not necessary to make a finding in this regard as it is our opinion, and we so find, a board of inquiry has jurisdiction within section 52(1) of the Charter to determine that a statutory provision (such as section 9(a) of the Code) is without force and effect because it violates section 15(1) of the Charter. Should such a finding ultimately be made, then a Complainant, if successful in establishing a breach of the Code, would be entitled to the appropriate remedies available under section 40 of the Code.

In making this finding of jurisdiction, we rely primarily upon the decision of the Supreme Court of Canada in R v. Big M Drug Mart Ltd., (1985), 58 N.R. 81. As Dickson, J., as he then was, states (at paragraph 38, page 95), section 52(1) of the Charter sets forth "the fundamental principle of constitutional law that the Constitution is supreme." It seems axiomatic that any body performing a judicial function in the sense of determining rights, has an obligation and duty to make its decision within the ambit of constitutional protection of those rights.

" If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the Charter, s. 52(1), is to give the court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect". (Ibid at p. 117). (Emphasis added)

Other authorities support this interpretation that a

board of inquiry has jurisdiction to make a determination of constitutionality under section 52(1) of the Charter: see Zwarich v. Attorney General of Canada, [1987] 3 F.C. 253 (F.A.) at 255, 256; International Ladies' Garment Workers' Union v. Third Dimension Manufacturing Limited, [1983] O.L.R.B. Rep. 261 at paras. 20 and 22, pp 264, 265; United Food & Chemical Workers International Union, Local 175 v. Cuddy Chicks Limited, O.L.R.B., majority decision of P. Hughes and R.E. Montague, 0310-87R, May 6, 1988, as yet unreported; T. Eaton Co. Ltd. [1985] O.L.R.B. Rep. 941 at para. 44, p. 966; Bank of Montreal (1985), 10 C.L.R.B.R. (N.S.) 129 (Canada Labour Relations Board) at 151.

Counsel for the Complainants Cryderman argues as well that on a policy and practical basis it is appropriate that this Board of Inquiry have jurisdiction to determine Charter issues. Although it is our view that the issue of jurisdiction is to be decided upon the interpretation of section 52(1) itself, there are several practical reasons why this interpretation is appropriate. First, it is best not to split the issues, which would be necessary if only a court could determine the Charter issues. Second, there would be a consequential duplication of evidence in this event, with attendant added costs. Third, given the specialized function of a human rights tribunal, it would seem that the most appropriate forum in the first instance to a Charter challenge is in the tribunal hearing itself, where the constitutional challenge can be put in the context of the overall

evidence.

This Board of Inquiry must, of course, determine what the law is as a prerequisite to applying the law. This means that we must not only construe and interpret the relevant legislative enactments, but also whether such enactments are constitutionally enacted. If it is concluded that a given provision is unconstitutional then it follows that the Board of Inquiry must then determine the matter before it as if the offending statutory provision has no force and effect.

As stated above, it is not necessary for the purpose of determining the jurisdictional issue that we make a finding that a human rights tribunal is a "court of competent jurisdiction" within the meaning of section 24(1) of the Charter. However, having reviewed the authorities, we are of the opinion obiter that a board of inquiry, within the limits of its jurisdiction as defined by the statute creating it, is a "court of competent jurisdiction" within the meaning of section 24(1).

In support of that conclusion, see Potapczyk v. MacBain (1984) C.H.R.R. 2302 at 2303, para. 19406 (involving a federal human rights tribunal); Law v. Solicitor-General of Canada (1983), 144 D.L.R. (3d) 549 at 553 (F.C.T.D.) (involving the Immigration Appeal Board); Overwaitea Foods Division of Jim Pattison Industries Ltd. v. Vancouver, New Westminster and

District Building and Construction Trades Council (1982) 27 Admin. L.R. 263 (B.C.L.R.B.); Re Nash and the Queen (1982), 70 C.C.C. (2d) 490 at 494 (Newfoundland Provincial Court) (involving a police disciplinary panel appointed pursuant to provincial legislation, where the court noted that the French text of section 24(1) refers to "un tribunal competent"); Moore v. The Queen in Right of B.C. (1986), 24 C.R.R. 136 at 140, 141 (B.C. S.C.); and Rahey v. The Queen (1987, 33 C.C.C. (3d), 289 (S.C.C.) per Lamer, J.)

In our view, the following cases which may suggest a contrary conclusion, are, with respect, incorrect or distinguishable: Canada (Attorney-General v. Vincer (F.C.A.) unreported, Dec. 1, 1987 (Court File No. A-132-87); O.P.S.E.U. v. Algonquin College of Applied Arts and Technology, Ont. Div. Ct., unreported, April 16, 1987; and endorsement of Court of Appeal on leave application, unreported, June 29, 1987; and The Board of Governors of St. Lawrence College v. O.P.S.E.U., Ont. Div. Ct., unreported, endorsement dated April 12, 1988. The later two cases involved consensual arbitration boards under collective bargaining agreements.

This same conclusion as we have made was reached recently by a majority of the Ontario Relations Board, after a very thorough review of the authorities, in United Food & Commercial Workers International Union, supra. See also Re

United Nurses of Alberta, Local 115 and Foothills Provincial General Hospital Board, 40 D.L.R. (4th) 163 (Alta Q.B.) (1987).

In our view, the Supreme Court of Canada decision in R. v. Big M. Drug Mart Limited (1985), 58 N.R. 81 (S.C.C.) supports our view as to the ambit of section 24(1). The Supreme Court of Canada there discussed the competing interpretations of section 24 (1) of the Charter, accepting the view that the "competent court" is that which has jurisdiction over the subject matter being litigated (at 96, paras. 44-47). In the instant situation, the Board of Inquiry has jurisdiction over the human rights complaints which are the subject matters being litigated.

(b) The Condominium Directors As Parties.

A second preliminary issue related to the directors of the Respondent condominium corporations being named as individual Respondent parties. It will be noted that in respect of the several Complaints, all name a condominium corporation as a Respondent, while some name individual directors and officers as co-Respondents, others referring more generally to the "Board of Directors" as a co-Respondent. Some Complaints also name as individual Respondents the property managers for the Respondent corporations.

Respondents' counsel made a motion that the individual Respondents be deleted from the Complaints. Commission counsel

did, on the Commission's own initiative, remove some individual Respondents as parties but wanted others to remain.

A Complaint can, of course, be made against any offending person, including a corporate entity (see s. 45(c) of the Code). A corporation is vicariously liable by section 44(1) of the Code generally for breaches of the Code, and even where it cannot be held to be vicariously liable, if the directing mind of the corporation has caused it to be in breach of the Code in the course of carrying on its business, then the corporation will be responsible. See Cindy Cameron v. Nel-Gor Nursing Home et al, [1984] 5 C.H.R.R. D/2170, paras. 18512 to 18519. Thus, corporate entities can, of course, certainly be respondent parties. However, if they are, the Complaint can still name as individual Respondents directors and officers who caused the corporate entity to do the action that is alleged to offend the Code. By analogy, an agent is liable in tort for his negligence, even though his principal may also be liable due to the agent's negligence. The fact the principal is liable does not excuse the agent. Section 8 of the Code says that "No person shall infringe or do, directly or indirectly anything that infringes a right under this Part". If a director, as a participant in a board of directors' decision, causes a corporation to unlawfully discriminate, then the director is himself in breach of the Code.

The Code is directed against unlawful discrimination by

any and all persons (including individuals and artificial entities created by juristic construct) who cause that discrimination. The impugned conduct need not be with evil intent, nor must it even be intentional. Unintentional or constructive discrimination can also be unlawful. The absence of evil intent, or intention to discriminate, may well influence the nature of the remedies given. However, the legislative purpose of the Code is to eradicate unlawful discrimination and the infringement of basic human rights, and to effectuate this objective the Code allows a Complaint to name as a Respondent any person who has caused such infringement of rights. Thus, individual directors and officers of offending corporations can be named Respondents. However, if a Complainant wishes to include individual directors as Respondents, in our opinion the individuals must be properly named. The "Board of Directors" is not, in itself, a legal entity. Nor is it encompassed within the definition of "person" given by section 45(c) of the Code. A "Board of Directors", as such, cannot be a Respondent as it is not a legal person.

Section 45(c) of the Code reads:

(c) "person" in addition to the extended meaning given it by the Interpretation Act, includes an employment agency, an employer's organization, an unincorporated association, a trade union, a partnership, a municipality, and a board of police commissioners established under the Police Act.

Section 30.28 of the Interpretation Act 1980 RSO c. 219 states:

(28) "person" includes a corporation, and the heirs, executors, administrators, or other legal representatives of a person, to whom the context can apply according to law.

Similar definitions of "person" appear in other human rights legislation in Canada (see, for example, B.C. Human Rights Act, s. 1; Alberta Individual's Rights Protection Act s. 38)(i); Saskatchewan Human Rights Code, s. 2 (m); Manitoba Human Rights Act, s. 1(i); New Brunswick Human Rights Code, s. 2; Nova Scotia Human Rights Act, s. 2(k)).

The definition in the Ontario Code was amended in 1981 to include an unincorporated association and partnership among other non-legal bodies. The reason for this amendment seems apparent from the case of Re Cummings and Ontario Minor Hockey Association (1980), 26 O.R. (2d) 7 (Ont. C.A.). Re Cummings involved a situation where the complainant attempted to bring an action under the 1970 Code against an unincorporated association (the OMHA) and, therefore, the case involved a discussion of "person". Wilson, J.A., as she then was, quoted from Dysart, J.'s judgement in Hague v. Cancer Relief and Research Institute, 47 Man. R. 325.

"In law, "a person" is any being that is capable of having rights and duties and is confined to that. Persons are of two classes only - natural persons, and legal persons. A natural person is a human being that has a capacity for rights or duties. A legal person is any thing to which the law gives a legal or fictitious existence and personality, with capacity for rights and duties. The only legal person known to our law is the corporation - the body corporate. There are other groups or associations of natural persons

which the statute law recognizes and endows with some rights or duties, such as registered trade unions, but these are not corporations" (at p. 12)

Wilson, J.A. goes on to state that in the Cummings case an unincorporated association was not covered by the definition of "person" in the legislation, stating that as a consequence the complaint "...should have been laid against named officers or directors of the respondent association." (at p. 14) The Code was then amended so that the particular situation in Cummings would have been decided differently today, but the reasoning remains the same. In Cummings, because the association was not a "legal" person recognized by law, and was not defined as a "person" under the statute, the then Code did not apply to it. Therefore, for the Code to apply to a "board of directors", as such, it must either be included under the definition of "person" in the Code (which it is not), or must otherwise be recognized as a legal person under statute law.

Generally, corporate law recognizes that individual directors are simply agents or legal representatives of the corporation - Automatic Self-Cleaning Syndicate Company, Limited v. Cuninghame [1906] 2 Ch. 34 at 43. Therefore, the directors of a corporation exist only as agents of the corporation, and generally speaking, third parties are dealing with the corporation itself, although the corporation must necessarily act through its real person agents, that is, its officers and

employees. The board of directors, as a collectivity, is not a legal person.

However, one must also consider the Condominium Act, 1980 RSO c. 84, as amended. Section 10(3) of the Condominium Act states that the Corporations Act does not apply to a condominium corporation. Section 14(5) states that the condominium corporation may be sued. Section 15(1) states that the board of directors shall manage the corporation. Section 24(1) states that each individual director shall exercise his duties honestly and in good faith. These provisions parallel similar ones to be found in general corporation statutes. See, for example, sections 14(1)(b), 120, 130, and 142, Ontario Business Corporations Act, 1980 RSO c. 54. Neither the Business Corporations Act nor the Condominium Act creates a legal person out of the board of directors.

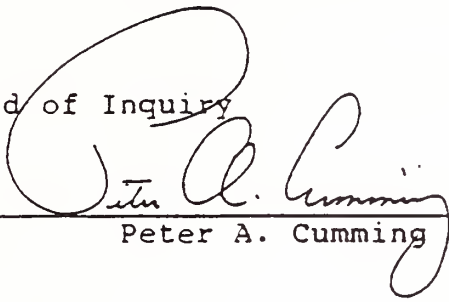
For the reasons given, the motions of the Respondents are denied, except that "Board of Directors" is deleted as a

party where so named as a Respondent in the Complaints.

Dated at Toronto this 16th day of June, 1988.

Board of Inquiry

per:


Peter A. Cumming

per:


Ian Springate

per:


Paula Knopf

